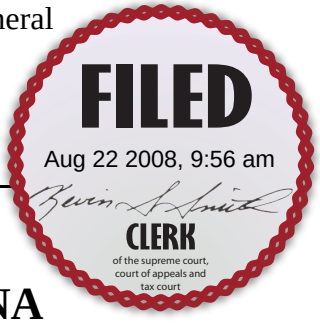
ATTORNEY FOR APPELLANT:

MARK J. DOVE
Dove & Dillon, P.C.
North Vernon, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

JUSTIN F. ROEBEL
Deputy Attorney General
Indianapolis, Indiana



IN THE COURT OF APPEALS OF INDIANA

ANTHONEY E. MAYBERRY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 69A01-0707-CR-294
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE RIPLEY SUPERIOR COURT
The Honorable James B. Morris, Judge
Cause No. 69D01-0603-FD-38

August 22, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Anthoney E. Mayberry challenges the denial of his motion for judgment on the evidence during his trial for class D felony attempted theft. We affirm.

The facts most favorable to the jury's verdict indicate that around 10:40 p.m. on May 25, 2006, Roxanne Payne observed a pickup truck drive down West County Road 425 North in Ripley County and stop in front of an adjacent property owned by Nathanial Moore. Moore, who did not reside on the property, had asked Payne to watch over his property because items had recently been stolen. Payne heard voices and saw a flashlight beam. As the truck pulled away, Payne watched the flashlight beam travel up Moore's driveway. Payne phoned the police and went outside, where she heard a clanking noise coming from the direction of the flashlight beam.

Indiana State Trooper Ben Bastin was the first officer to arrive on the scene. Initially, Trooper Bastin did not notice anything suspicious, but after closer inspection he observed a swaying "hot" line leading to an electric fence, which appeared to have been recently tripped over or run through. Tr. at 25. A short distance from the line, Trooper Bastin observed Anthoney hiding on his stomach in the grass. Anthoney told the officer that he had been drinking in a nearby town and was walking home alone. Minutes later additional officers arrived on the scene and found Anthoney's brother John lying face-down in the grass nearby. After being advised of his rights, John told the police that he had been in a fight with his wife at a bar and that he and Anthoney were walking home. A search of John produced gloves, wire cutters, and a flashlight.

After the brothers were arrested, Moore arrived and found that his dune buggy had been moved approximately 108 feet from its normal storage place behind his barn, out onto

his driveway. Trooper Bastin observed two sets of shoeprints on each side of the vehicle and tire tracks along the vehicle's path, indicating that the vehicle had recently been moved. John told State Police Sergeant Terry Nickell that he and Anthoney had previously been to Moore's property to speak with neighbors about who owned the dune buggy.

While the officers were still on the scene, a pickup truck arrived driven by John's wife, Terri Mayberry. Terri claimed she was driving home and had made a wrong turn. Sergeant Nickell observed that Terri's speech was slurred and that there was an open bottle of beer in the passenger compartment. Sergeant Nickell also noticed a large "log chain," often used for towing, in the bed of the truck. *Id*. at 122-23. Terri was arrested for driving while intoxicated. John admitted to Sergeant Nickell that his wife had dropped them off earlier and had come back to pick them up. Terri later admitted the same during a recorded conversation with her arresting officer.

Sergeant Nickell collected the boots worn by Anthoney and John, while Officer Robert Ewing made casts of shoeprint impressions found on the scene. State police crime lab employees determined that the impressions were made by shoes consistent with John's boots and inconsistent with Anthoney's boots.[1]

On March 27, 2006, the State charged Anthoney with class A misdemeanor trespass. On March 30, 2006, the State filed an amended information adding a charge of class D felony attempted theft. On February 23, 2007, the trial court permitted the State to consolidate Anthoney's and John's cases. On May 14, 2007, the State dismissed the

[1] Contrary to Anthoney's contention, this fact alone is not conclusive of his innocence.

trespassing charge, and a jury trial began on May 16, 2007. At the close of the State's evidence, Anthoney moved for judgment on the evidence, which the trial court denied. On May 18, 2007, the jury found Anthoney guilty of class D felony attempted theft. This appeal ensued.

Anthoney contends that the trial court erred in denying his motion for judgment on the evidence. Our standard of review for the denial of a motion for judgment on the evidence is the same as that for a challenge to the sufficiency of the evidence. *Hornback v. State*, 693 N.E.2d 81, 84 (Ind. Ct. App. 1998). On a claim that the evidence is insufficient to support a jury's verdict, we neither weigh the evidence nor judge the credibility of witnesses. *Id*. We consider only the evidence favorable to the jury's verdict, along with all reasonable inferences that can be drawn therefrom. *Id*. We will affirm the conclusion of the jury if there is substantial evidence of probative value to support their determination. *Id*.[2]

To convict Anthoney of class D felony attempted theft, the State was required to prove that he took a substantial step toward exerting "unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use." Ind. Code §§ 35-41-5-1, 35-43-4-2. A substantial step "is any overt act beyond mere preparation and in furtherance of intent to commit an offense." *Childers v. State*, 813 N.E.2d 432, 435 (Ind. Ct. App. 2004). "The determination of what constitutes a substantial step is left to the province of the jury." *Neuhoff v. State*, 708 N.E.2d 889, 893 (Ind. Ct. App. 1999). We will sustain a

[2] "One who elects to present evidence after a denial of his motion for directed verdict made at the end of the State's case waives appellate review of the denial of that motion." *Snow v. State*, 560 N.E.2d 69, 74 (Ind. Ct. App. 1990). At the close of the State's case, Anthoney did not present any evidence on his behalf. John, however, presented testimony that he and Anthoney pushed the dune buggy from the barn out onto the gravel driveway. Tr. at 370-71. We do not rely on John's testimony in our analysis.

conviction based on circumstantial evidence alone if the circumstantial evidence supports a reasonable inference of guilt. *Altes v. State*, 822 N.E.2d 1116, 1121 (Ind. Ct. App. 2005), *trans. denied*.

Anthoney contends that the State was able to establish only his presence at the scene and relies on the general rule that "mere presence at the scene of the crime is not sufficient to allow any inference of participation." *Peterson v. State*, 699 N.E.2d 701, 706 (Ind. Ct. App. 1998). We disagree. The evidence most favorable to the jury's verdict indicates that Terri Mayberry dropped off Anthoney and John at Moore's property. Police found Anthoney hiding face-down in the grass. Moore's dune buggy, which normally was kept behind his barn, had been pushed out onto his driveway. John admitted to officers that he and Anthoney had previously been to Moore's property speaking with neighbors about the dune buggy. Further, tire tracks and shoeprints were found alongside the vehicle's path, indicating that it had recently been moved. When Terri returned to pick up Anthoney and John, police found a "log chain," often used for towing, in the bed of the truck. We conclude that the evidence and reasonable inferences to be drawn therefrom are sufficient to support a finding that Anthoney attempted to commit theft. Therefore, the trial court did not err in denying Anthoney's motion for judgment on the evidence.

Affirmed.

KIRSCH, J., and VAIDIK, J., concur.